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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
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8 CODY CORY LEAVITT,

Case No. 2:12-cv-00987-JCM-CWH

9 Petitioner,

v.

ORDER

10 DWIGHT NEVEN, et al.,

11 Respondents.  
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14 This is a habeas corpus action brought under 28 U.S.C. § 2254. On August 3,  
15 2018, this court entered an order dismissing as procedurally defaulted Grounds 1, 3, 4,  
16 6, a portion of Ground 7, and Ground 8 of Leavitt's amended petition (ECF No. 54). ECF  
17 No. 150. The court arrived at that decision after concluding that Leavitt had failed to  
18 demonstrate cause and prejudice or a fundamental miscarriage of justice in relation to  
19 his defaults. *Id.* On August 15, 2018, Leavitt filed a motion asking this court to  
20 reconsider its decision. ECF No. 151. For the reasons that follow, the motion is denied.

21 First, Leavitt argues that, given the opportunity, he can demonstrate a  
22 fundamental miscarriage of justice based on his actual innocence. "To be credible, such  
23 a claim [of actual innocence] requires petitioner to support his allegations of  
24 constitutional error with new reliable evidence -- whether it be exculpatory scientific  
25 evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not  
26 presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Further, "the petitioner  
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1 must show that it is more likely than not that no reasonable juror would have convicted  
2 him in light of the new evidence.” *Id.* at 327.

3 In support of his actual innocence claim, Leavitt cites to evidence indicating that  
4 DNA samples in his case may have been contaminated. Such evidence, by itself, falls  
5 well short of establishing his actual innocence, especially in light of his plea of guilty to  
6 the relevant charge. *Id.* at 324 (“[A] substantial claim that constitutional error has caused  
7 the conviction of an innocent person is extremely rare.”). In addition, the evidence cited  
8 is hardly “new” inasmuch as it was presented in his first state post-conviction  
9 proceeding in 2010. ECF No. 63-5.

10 Next, Leavitt claims that the state district court’s mishandling of his post-  
11 conviction petition was a “factor external to the defense [that] impeded [his] effort to  
12 comply with the State’s procedural rule.” ECF No. 151, p. 7-8. *See Murray v. Carrier*,  
13 477 U.S. 478, 488 (1986). He fails to address, however, why he failed to timely appeal  
14 the state district court’s dismissal of his petition. ECF No. 125, p. 2.

15 Leavitt also argues that this court erred by not treating his unexhausted claims as  
16 technically exhausted in the first place, rather than having him return to state court,  
17 because state court remedies were no longer available under state law. Even if that is  
18 the case, however, Leavitt claims would nonetheless be subject to the procedural  
19 default doctrine. *See Smith v. Baldwin*, 510 F.3d 1127, 1139 (9<sup>th</sup> Cir. 2007). His  
20 suggestion that the default of the claims could be excused based on the holdings in  
21 *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), is  
22 inaccurate because, as this court has previously pointed out, the default did not arise  
23 from his failure to present the claims in his in “initial-review collateral proceedings.” ECF  
24 No. 150, p. 3 (citing *Martinez*, 566 U.S. at 16).

25 Having found no grounds reconsideration, the court stands by its prior decision.

26 **IT IS THEREFORE ORDERED** that petitioner’s motion for reconsideration (ECF  
27 No. 151) is DENIED.  
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**IT IS FURTHER ORDERED** that the respondents' motion for extension of time (ECF No. 152) is GRANTED *nunc pro tunc* as of September 13, 2018. Respondents' second motion for extension of time (ECF No. 154) is also GRANTED. Respondents' shall have until December 3, 2018, to answer the remaining claims in the amended petition (ECF No. 54). To the extent they have not done so already, respondents shall comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner shall have **45 days** from the date on which the answer is served to file a reply.

**IT IS FURTHER ORDERED** that petitioner's' motion for extension of time (ECF No. 156) is GRANTED.

DATED October 22, 2018.

James C. Mahan  
UNITED STATES DISTRICT JUDGE